

Untitled

SENT VIA U.S. MAIL AND E-MAIL

MEMORANDUM

TO: Service List, Bell Atlantic Tariffs M.D.T.E. Nos. 14 and 17, D.T.E. 98-57

FROM: Tina W. Chin, Hearing Officer

Karl en J. Reed, Hearing Officer

DATE: November 5, 1999

RE: Hearing Officer Ruling on Motion for Confidential Treatment filed by Bell Atlantic

CC: Mary Cottrell, Secretary

Commission

-----  
Attached is the Hearing Officer Ruling in this docket:

(1) Granting Bell Atlantic's Motion for Confidential Treatment regarding its responses to MCI WorldCom, Inc. Information Request No. IS-59 and Global NAPs Information Request Nos. 1-2 and 1-3 with respect to the identification of third-parties;

(2) Denying Bell Atlantic's Motion for Confidential Treatment regarding its response to Global NAPs Information Request No. 1-12; and,

(3) Denying Bell Atlantic's Motion for Confidential Treatment regarding its response to ACI Corporation Information Request No. 3-12.

Untitled

Should you have any questions regarding this Ruling, please contact Tina W. Chin at (617) 305-3578.

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

---

Investigation by the Department of Telecommunications and )  
Energy on its own motion as to the propriety of the rates and )  
charges set forth in the following tariffs: M.D.T.E. Nos. 14 and )  
17, filed with the Department on August 27, 1999, to become ) D.T.E. 98-57  
effective on September 27, 1999, by New England Telephone )  
Telegraph Company d/b/a Bell Atlantic-Massachusetts. )  

---

HEARING OFFICER RULING ON

MOTION FOR CONFIDENTIAL TREATMENT BY

BELL ATLANTIC-MASSACHUSETTS

## I. INTRODUCTION

On September 3, 1999, Global NAPs, Inc. ("GNI") issued its First Set of Information Requests to New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic"). On September 29, 1999, MCI WorldCom, Inc. ("MCIW"), issued its First Set of Supplemental Information Requests to Bell Atlantic. On that same day, ACI Corp. d/b/a Accelerated Connections(1) ("ACI") issued its Third Set of Information Requests to Bell Atlantic. On October 14, 1999,

#### Untitled

Bell Atlantic filed its responses to MCIW's First Supplemental Information Requests No. 59 ("MCIW-BA 1S-59") with the Department. On October 15, 1999, Bell Atlantic filed its responses to GNI's First Set of Information Requests Nos. 2, 3, and 12 ("GNI-BA 1-2, 1-3, 1-12") with the Department. On October 22, 1999, Bell Atlantic filed its response to ACI's Third Set of Information Requests No. 12 ("ACI-BA 3-12") with the Department. On October 22, 1999, Bell Atlantic also filed a Motion for Confidential Treatment ("Motion") seeking protective treatment for its responses to MCIW-BA 1S-59, ACI-BA 3-12, and to GNI-BA 1-2, 1-3, 1-12. On October 29, 1999, GNI filed with the Department its Response to Bell Atlantic's Motion for Confidential Treatment ("Response").

## II. MOTION FOR CONFIDENTIAL TREATMENT

### A. Standard of Review

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states, in relevant part, as follows:

"[T]he [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent to prove the need for such protection. Where such a need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need."

G.L. c. 25, § 5D exempts the Department, in certain narrowly defined circumstances, from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, confidential, competitively sensitive or other proprietary information." Second, the party seeking protection must overcome the statutory presumption that all such information is public information by "proving" the need for its non-disclosure. Third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need. G.L. c. 25, § 5D. Compliance with a Departmental request for information can be enforced by summons and subpoena issued under G.L. c. 25, § 5A, G.L. c. 268, § 6, G.L. c. 30A, § 12, 220 C.M.R. § 1.10(9), and 220 C.M.R. § 1.15(3).

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See *Boston Edison Company*; *Private Fuel*

Untitled

Storage Limited Liability Corporation, D.P.U. 96-113, at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also, Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer."); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

All parties are reminded that requests for protective treatment have not been and will not be granted automatically by the Department. A party's willingness to enter into a nondisclosure agreement does not resolve the question of whether the response should be granted protective treatment. Boston Electric Company, D.T.E. 97-95, Interlocutory Order on: (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

In determining whether certain information qualifies as a "trade secret," Massachusetts courts have considered the following: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and its competitors; (5) the amount of effort or money expended by the employer in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Jet Spray Cooler, Inc. v. Crampton*, 361 Mass. 835, 840 (1972) (citing Restatement of Torts, § 757, cmt. b). The burden to demonstrate that certain information meets this test is on the party seeking to have the information protected from public disclosure. G.L. c. 25, § 5D.

## B. POSITIONS OF THE PARTIES

### 1. Bell Atlantic

First, Bell Atlantic contends that MCIW-BA 1S-59 and GNI-BA 1-2 and 1-3 request information which consists of third-party specific data (Motion at 3). Specifically, Bell Atlantic states that MCIW-BA 1S-59 seeks information regarding the location by carrier of collocation arrangements in each central office and that GNI-BA 1-2 and 1-3 request the number of Points of Termination ("POTs") used by each competitive local exchange carrier ("CLEC") to exchange traffic with Bell Atlantic (id.). Bell Atlantic asserts that where carriers choose to establish collocation arrangements or where they situate their POTs not only identifies where their facilities are located, but more importantly may provide valuable insight into where their customers reside or where they are focusing their competitive marketing efforts, thereby giving competitors an unfair business advantage (id.).

## Untitled

Bell Atlantic further states that information regarding where carriers place their POTS or the total amount of collocated space utilized by those carriers is not universally known by their competitors, is not readily obtainable from other non-Company sources, and is not reasonably duplicated by competitors (id. at 4). If forced to publicly divulge the information requested without carrier permission, Bell Atlantic states that competitors may then obtain access to that data to assist them in their competitive initiatives leading to an anti-competitive result (id.).

Second, GNI-BA 1-12 requests that Bell Atlantic provide a map of the location of Bell Atlantic's fiber optic network in Massachusetts. Bell Atlantic states that its fiber optic network is deployed and configured based on various factors, including the type of services, the class of customers, volume and duration of calls, type of traffic, and facilities available in a particular office (id. at 5). Thus, Bell Atlantic argues, production of a map delineating all of its fiber routes to its competitors would reveal considerable information regarding Bell Atlantic's operational decisions which would assist competitors in their marketing efforts and competitive initiatives (id.).

Furthermore, Bell Atlantic indicates that because data identifying all of its fiber optic routes in Massachusetts are not publicly available, and not readily obtained from other non-Company sources, competitors would have no means to independently develop that highly sensitive data (id.).

Third, with respect to ACI-BA 3-12, Bell Atlantic argues that individual providers' collocation request information are identified by type of collocation application, central office ("CO") location, and square footage requested and, since competitors would be unable to replicate the individual collocation information, it provides an unfair business advantage to competitors if publicly divulged (id. at 6). Bell Atlantic notes that it provided total collocation space requirements by CO in response to ACI-BA 3-12(2) with redacted carrier identification by name and code to prevent disclosure of specific collocation requests and is willing to provide the masked data on a confidential basis subject to reasonable terms of the standard protective agreement, which properly limit the use of the data to the preparation and conduct of this proceeding (id.).

## Global NAPs

In its Response to Bell Atlantic's Motion, GNI states that Bell Atlantic's Motion should be denied since the relief requested would violate G.L. c. 30A and Department precedent (Response at 1). GNI asserts that Bell Atlantic "seeks the extraordinary remedy of shielding from parties in this case information responsive to information requests and relevant to terms of the Bell Atlantic tariff that are in dispute" by its request to provide responses MCIW-BA 1S-59, GNI-BA 1-2, 1-3 and 1-12 only to the Department (id.). Assuming, arguendo, that the information sought by these information requests is competitively sensitive and a trade secret, GNI argues that the appropriate course of action is to permit disclosure of the information only to counsel and outside consultants who have executed an appropriate non-disclosure agreement (id.).

## Untitled

In support of its position, GNI cites Boston Edison Co., D.T.E. 97-95 (July 2, 1998) where the Department rejected Boston Edison's proposal of a non-disclosure agreement that sought to create a category of commercially sensitive material which would be made available only to governmental agencies. GNI also points to the March 9, 1999 Hearing Officer Ruling in D.T.E. 97-95 where the hearing officer denied a similar request made by another party in the case with respect to information responsive to an information request. In addition, GNI refers to Western Massachusetts Electric Co., D.T.E. 92-8C-A (1993), where the Department rejected a claim of privilege stating that "the creation of such privileges ordinarily is better left to the Legislature." D.P.U. 92-8C-A, at 24.

### C. Analysis and Findings

Bell Atlantic asserts the need for confidential treatment of the information requested in MCIW-BA 1S-59, GNI-BA 1-2, 1-3, and 1-12, and ACI-BA 3-12. In its Motion, Bell Atlantic touches briefly on various aspects considered by Massachusetts courts in resolving this issue.

The Hearing Officer has reviewed Bell Atlantic's responses to MCIW-BA 1S-59, GNI-BA 1-2 and 1-3. Since the responses involve divulging third-party specific data which could jeopardize the competitive positions of those third parties who may or may not be parties to this proceeding, the Hearing Officer finds that Bell Atlantic has demonstrated that the submitted materials regarding location by carrier of collocation arrangements in each central office, the number of POTs by carrier, and the number and name of CLECs with a single POT in a LATA which have their traffic switched through a tandem switch are confidential or competitively sensitive material which need not be subjected to public disclosure. Accordingly, unless the individual CLECs waive protection and grant permission to Bell Atlantic to publicly disclose this third-party specific information, the Hearing Officer grants Bell Atlantic's motion to treat the materials submitted pursuant to MCIW-BA 1S-59 and GNI-BA 1-2 and 1-3 as confidential, proprietary materials. In addition, since only the names of the third-parties are competitively sensitive, this Hearing Officer directs Bell Atlantic to submit copies of its responses to MCIW-BA 1S-59, GNI-BA 1-2 and 1-3 redacting the names of third-parties redacted or, if appropriate, to provide aggregated information. These findings are made subject to the need of the Department to use the competitively sensitive information contained therein in its considerations and rulings in this matter. Should the Department need to use material deemed competitively sensitive, those specific references will be identified, declassified and incorporated in the Department's rulings.

The Hearing Officer has reviewed Bell Atlantic's response to GNI-BA 1-12 and finds that Bell Atlantic has not sufficiently demonstrated in its Motion that the data contained in the submitted map outlining the location of Bell Atlantic's fiber optic network in Massachusetts constitutes a trade secret or is confidential or competitively sensitive material. Accordingly, the Hearing Officer denies Bell Atlantic's motion to treat the materials submitted under GNI-BA 1-12 as confidential, proprietary materials. The Hearing Officer directs Bell Atlantic to provide to the parties on the service list its response to GNI-BA 1-12.

Untitled

With regard to ACI-BA 3-12, the Hearing Officer has reviewed Bell Atlantic's response and, since the response redacts carrier identification by name and code, the Hearing Officer finds that Bell Atlantic has not demonstrated that the submitted material regarding total collocation space requirements by central office constitutes a trade secret or is confidential or competitively sensitive material which need not be subjected to public disclosure. Accordingly, the Hearing Officer denies Bell Atlantic's motion to treat the materials submitted under ACI-BA 3-12 as confidential, proprietary materials. The Hearing Officer directs Bell Atlantic to provide to parties on the service list its response to ACI-BA 3-12.

### III. RULING

Accordingly, after due consideration, the Hearing Officer finds:

(1) That the Motion for Confidential Treatment of New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts is granted with respect to identification of third-parties in responses to MCIW-BA 1S-59 and GNI-BA 1-2 and 1-3;

(2) That the Motion for Confidential Treatment of New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts is denied with respect to GNI-BA 1-12; and,

(3) That the Motion for Confidential Treatment of New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts is denied with respect to ACI-BA 3-12.

Under the provision of 220 C.M.R. § 1.06(6)(d)(3), any aggrieved party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation by November 10, 1999, at 5:00 p.m. A copy of this Ruling must accompany any appeal. Any response to any appeal must be filed by November 16, 1999, at 5:00 p.m.

November 5, 1999

---

Tina W. Chin

Hearing Officer

1. ACI has changed its name to Rhythms Links, Inc.
2. On page 6 of its Motion for Confidential Treatment, it appears that Bell Atlantic incorrectly cites ACI-IR-1-12 rather than ACI-IR-3-12 which is referred to as ACI-BA 3-12 in the present ruling.